27528

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 558.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, Sheriff, and *ex officio* Treasurer of Wilkes County,
Petitioners.

vs.

W. N. COLER & COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING WRIT.

CHARLES PRICE,
Of Counsel for Respondents.

This case was before this Court in 1900, on certificate from the United States Circuit of Appeals, Fourth Circuit, (*Wilkes County vs. Coler*, 180 U. S., 506).

This Court expressly held that, if Wilkes County stood in the same category with Forsyth County, then the bonds in question were valid, legal bonds.

In this decision Justice HARLAN, delivering the opinion of the Court, laid down propositions of law, deemed by a majority of the Circuit Court of Appeals, decisive of the *Stanly County case*, in favor of the validity of the bonds issued by that county. That case stood for reargument in the Circuit Court of Appeals, upon a petition to rehear, and was ordered to await the decision of the Supreme Court, upon the questions certified as before stated (see Mr. Price's brief in Stanley case, filed 5th of May, 1902, page 8).

At the May Term of the Circuit Court of Appeals, for the year 1901, as we say, both cases stood for argument, the *Wilkes case*, sent back, for further proceedings, and the *Stanly case*, upon petition to rehear.

Both cases were set down for argument at the same time, the questions involved being, in some respects, similar. The record containing the answers to the questions certified, in the *Wilkes case*, was received from the Supreme Court of the United States during the May Term of the Court, and we, as counsel for the respondents, expressed to the Court our unwillingness to proceed with the argument then, supposing the cased would stand for argument at the next term, November, 1901. Indeed, supposing such to be the practice, we had not prepared briefs in the cases.

The counsel for the counties, however, insisted that the argument of the cases be proceeded with, and the Court, consisting of Circuit Judge GOFF, Judge MORRIS and Judge BOYD, so directed.

It should be noted that Circuit Judge GOFF and Judge MORRIS both sat in the *Stanly case*, when heard and decided before. It is also to be noted that Judge

BRAWLEY, who had in the former hearing sat with Judges GOFF and MORRIS, was in attendanue upon that session of the Court, May Term, 1901.

We mention these facts in view of the allegations of bias on the part of Judge BOYD, as they are contained in the petition of the County of Wilkes, and the argument of counsel in the brief filed in support of the same.

After the decisions in these cases filed at the February Term of the Circuit Court of Appeals, for the year 1902, the learned counsel discovers that his Honor, Judge BOYD, was biased, and disqualified to sit in this case, having been counsel for the railroad company in years past.

We are not aware of any such allegation made in a similar paper to this petition for the issue of a writ of *certiorari;* nor do we believe another can be found in the records of the Court.

The remarkable thing in connection with this petition is that it has lain in the office of the Clerk ot this Court for two months, after having been published in the newspapers in North Carolina, immediately after it was prepared.

It was not pretended that the publication of matter, which went to the discredit of a defenseless Judge, could, in any way, advance the cause of the petitioners or show the incorrectness of the decision of the Court, and we are at a loss to know what its purpose was.

Even now we cannot conceive what the purpose was. It is not true that Judge BOYD was biased, or that he had ever in any manner considered the case, or heard anything about the bonds or that he was or is in any way whatever interested therein.

Not knowing how to meet this attack upon Judge BOYD, an upright, able, conscientious Judge, we in-

formed him of this allegation in the petition and re-received from him a letter, in relation, thereto, the original of which is filed with the papers in this case.

The letters is as follows :

GREENSBORO, N. C., April 19th, 1902.

HON. CHAS. PRICE,
Salisbury, N. C.:

DEAR SIR—I am in receipt of your favor of the 17th inst., relative to the petition lately filed in the Supreme Court, for writ of *certiorari*, in the suit of W. N. Coler vs. The Board of Commissioners of Wilkes County, decided at February Term of the Circuit Court of Appeals for the Fourth Circuit. My attention had already been called to the averments relative to myself contained in the petition filed by the counsel for the Board of Commissioners. I am at a loss to know from what source the counsel who drafted this petition and made affidavit to it derived his information, upon which he based the allegations referred to, for very certainly they are unfounded in fact. You know, as you state in your letter to me, that the statement that you were furnished with copies of Judge MORRIS' opinions in these bond cases, is untrue. It is also untrue, that I was, in any way connected as counsel or otherwise, in the issuing or sale of the Wilkes County bonds. I was never consulted as to their validity, and gave no opinion to Col. A. B. Andrews or any other person, with reference to same. It is true that for several years I was employed as local counsel for the old Richmond & Danville Railroad Company, but my duties were confined to the County of Guilford, and it is my recollection that I was not in this employment in the years 1888 and 1889. You will perhaps recall the fact that in one or both of these years, I represented, as attorney, persons having claims against the Richmond & Danville Railroad Company, for injuries received at Fat Nancy trestle, near Orange Court House, Virginia, and collected several large amounts from the Company on this account. But, however it may be, as to my relations with the Richmond & Danville Railroad Company, in the year 1889, I repeat, that I had nothing whatever to do with the Wilkes County bonds, as counsel or otherwise, and if the Richmond & Danville Company was in any way interested in these bonds I had no knowledge of it. I do not know what latitude will be allowed the counsel by the Supreme Court in

filing petitions for *certiorari*, but it is certainly a practice heretofore unheard of to incorporate in such petitions reflections upon the lower Courts, or upon individual Judges who compose such Courts. I sat upon the Circuit Court of Appeals, not upon my own motion, but because I was required to do so by law, and there was no suggestion or intimation at the time the Wilkes County bond case was argued that I was in any way disqualified to hear it; and, indeed, there was no ground existing upon which any such suggestion or intimation could have been made. In passing upon this case I had only one object in view, and that was to administer the law as I understood it. If, for discharging a duty which thus devolved upon me according to my honest convictions, I am to be made the object of criticism and reflection in a petition filed in the Supreme Court, then no Judge of a lower Court will have protection from such assaults in any case. I am,

Yours very truly,
(Signed) JAS. E. BOYD,
U. S. District Judge.

In this connection, we have to state that no railroad company is in any way connected with these bonds, or has any interest whatever in these bonds or in the result of this litigation.

We take it, that this Court will consider that, in this charge, against Judge BOYD, a wrong, and an injustice has been done him, and we have copied his letter in this brief, that the Court may see that the charge is wholly untrue.

The allegation, as to bias of Judge BOYD, having nothing to sustain it, in fact, that part of the brief of the counsel, addressed to its consideration, we dismiss, without further notice, than to say, it is gratuitous, cruel, and merits the rebuke of the Court.

The first point made in the brief of counsel for the county seems to be a copy of what was set out, in the brief for the petitioners, in the *Stanly case*, filed on the 5th of May, 1902.

We contend that there is not a conflict between the decisions of the Supreme Court of North Carolina, and the Circuit Court of Appeals. The case of the *Commissioners vs. Call*, 123 N. C., 308, was one evidently gotten up to effect a repudiation of the honest debt of Wilkes County. When that case reached the Supreme Court of North Carolina, the parties, plaintiffs and defendants, were not adverse, and as said by Judge SIMONTON in the *Stanly case*, on the Circuit, "were practically one." In the published volume no counsel appeared, except the counsel for the plaintiffs, a fact which served to impress the Justices of the Court, who dissented from the judgment as entered. Justice FURCHES, now Chief Justice, with whom concurred FAIRCLOTH, late Chief Justice, on page 336, Volume 123, N. C., says:

"The Court, in its opinion, says that certain positions were strenuously insisted on by the defendant. I think this must be a mistake, as this case was not argued before us, either by brief or by oral argument on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of the Court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. * * * But, as to the conduct of the case before this Court, it has been unilateral."

In this, as before suggested, the Chief Justice FAIRCLOTH concurred. The truth is, if the counsel for plaintiffs had called the attention of the Court to the fact, the case was before the Court erroneously, because the time in which the appeal was to be perfected had expired before Turner and Wellborn were made parties (pages 69, 70, 71 and 72 of Record).

Again, by reference to the answer of Clarence Call, defendant (page 79, Printed Record), it will be seen that he refused to perfect the appeal, after being importuned to do so by plaintiffs. He alleges in his answer that, "by some means unknown to this defendant," Wellborn and Turner became parties to the proceedings after he had refused to appeal.

He further says the plaintiffs offered to pay his attorneys' fees and costs of the appeal, if he would perfect the same.

It will be hard for the Court, in the light of the record, to escape the conclusion that the case was one gotten up for the purpose of repudiating this honest debt of Wilkes County.

Justice DOUGLAS, in his opinion, *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceedings, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows *that he did not believe* from the record that Turner and Wellborn were *bona fide* holders of even *one* bond, or that they actually participated in the defense of the case in the State Court.

As we insist, the record shows that this proceeding in the State Court was one imposed upon that Court to effect a repudiation of an honest debt. After the decision of what was known as the *Oxford Bank case* by the Supreme Court of the State, 119 N. C., 214, enterprising lawyers began to look up cases where bonds were issued without full compliance with the

constitutional requirements as to the entry of the yeas and nays upon the journals. And thus began the *Stanly case* followed by this case.

In the dissenting opinion of FAIRCLOTH, Chief Justice, in the *Stanly case*, in the closing paragraph, on page 410, Vol. 121, N. C., he says :

" They have recognized and paid the annual interest on these bonds for several years without objection and it is *possible* that they never discovered the absence of the words 'yea' and 'nay' on the journals until since the decision of this Court in *Bank vs. Commissioners*, 119 N. C., 214, decided in 1896."

We have stated, with some detail, the history of this litigation, to show how these cases were begun, and prosecuted, so that it may appear to this Court, *that they are entirely without merit*, and were for the purpose, as before said, of repudiating honest debts.

These decisions of the State Court are not such as are contemplated in the case of *Forsyth vs. Hammond*, 166 U. S., 506, relied on by petitioners.

Looking at the case of *Commissioners vs. Call*, 123 N. C., 308, the substance of the decision is, 1st: " Legislation authorizing the creation of county indebtedness, must conform to constitutional requirements," and 2d: " A county bond, stating on its face the Act under which it is issued, is notice to the holder, and estops him from contradicting the statement."

Here we call attention to the following from Judge MORRIS' opinion :

" The recitals of the bonds in suit are as follows :
" 1. That the bond is issued by authority of an Act of the General Assembly of North Carolina ratified the 20th day of February, A. D. 1879. This Act being an invalid enactment and not a law, so far as it undertakes to give power to issue bonds, this recital does

not preclude enquiry as to whether or not there was such a law and the existence of legislative authority.

Northern Bank vs. Porter Township, 110 U. S., 608.

But the recital of an invalid act does not preclude enquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond, could be upheld.

Wilkes County vs. Coler, 180 U. S., 506-524.
Anderson County vs. Beal, 113 U. S., 227.
Commissioners vs. January, 94 U. S., 202.
Evansville vs. Dennett, 161 U. S., 434, 443-444.
Knox County vs. Ninth National Bank, 147 U. S., 91."

It does not pretend elsewhere than in the answer, that this decision estops the complainants, innocent holders of the bonds. It is not a bar, nor will this Court follow the decisions, in passing upon the rights of the parties to this suit.

Carroll Co. vs. Smith, 111 U. S., 563.
Pana vs. Bowler, 107 U. S., 544, 545.
Brooklyn vs. Ins. Co., 99 U. S., 370.
Empire vs. Darlington, 101 U. S., 92.
Wilkes Co. vs. Coler, 180 U. S., 506.

In the outset, we mentioned the fact that this case had already been before this Court, and considering the principles decided, and laid down by the Justice, writing the opinion of the Court, we are justified in the contention, as we believe, that those principles are decisive of the case in favor of the complainants. If such is the fact, then this Court will not grant this writ of *certiorari*.

In *Turner vs. Wilkes County Commissioners*, 173 U. S., 461, the case on writ of error to the North Carolina Supreme Court, this Court pointed out in what cases the jurisdiction would be entertained, and that the rule was different and the principles different, where a case

was taken from a Circuit Court of the United States by writ of error to the Supreme Court (see, also, to same effect *Central Land Company vs. Laidley*, 159 U. S., 103.)

In the case of *Wilkes County vs. Coler*, 180 U. S., 506, when this case was before this Court in answer to the questions certified, this Court said:

1st. "That the circuit court of the United States should have regarded the decisions of the supreme court of North Carolina in *Bank v. Commissioners*, *Commissioners v. Snuggs*, *Rodman v. Washington*, *Commissioners of Wilkes County v. Call* and *Commissioners v. Payne*, referred to in the first certified question, as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State Court, to be, at the time, the bonds here involved, were made in the name of the county, and put upon the market.

Whereupon, it is now here ordered by this Court, that it be so certified to the said United States Circuit Court of Appeals.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this Court as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 19th day of April, in year of our Lord one thousand nine hundred and one."

Mr. Justice HARLAN, in his decision, 180 U. S., 506, 519 says:

"In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the Circuit Court of the United States justified in holding the acts of 1868, 1878, and 1881 to be laws of the State? *Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose.* May a Federal court disregard the decisions of the

highest court of the State holding that such enactment, in the form of a statute, was never passed so as to become, under the State Constitution, a law ?"

The above paragraph draws the distinction clearly and expressly between "*the issue as to the construction, meaning and scope of a statute*," and the issue, as to "*whether that which purports to be a legislative enactment ever became a law for any purpose.*" The Court holds that the decisions of the highest court of the State upon the question as to whether "an enactment, in the form of a statute, was ever passed, so as to become, under the State Constitution, a law," or not, are not to be disregarded.

In his opinion, he discusses the Ordinance of 1868, the charter of the corporation, and expressly decides that it gave the power to Forsyth County to issue the bonds, and further, that the Supreme Court of North Carolina had so held in two cases, long before the issue of the bonds in question (*Belo vs. Commissioners*, 76 N. C., 489; *Hill vs. Commissioners*, 67 N. C., 367).

Mr. Justice HARLAN expressly stated that the *Belo* case held that the said Ordinance of March 9, 1868, conferred the authority upon *Forsyth County* to make the subscription, and that this was so, independently, of the Act of August, 1868, or of any other legislation (p. 529).

The Supreme Court says at page 529:

"Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid, *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force, and, therefore, gave power to counties, embraced by its provisions, to take stock in that company and pay for it in county bonds, just as Forsyth County has done.*"

As to *Wilkes County*, he states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question, he states, "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes County is in the same category with Forsyth County, then it stands decided by the Supreme Court of the United States, that the said Ordinance of 1868, does, *per se*, give to Wilkes County the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question now, is, whether Wilkes County is in the same category with Forsyth County. If so, then the answer of the Supreme Court to the second question applies, which is, that the rights of the parties in the Wilkes County case are determinable, by the law of the State, as it was decided by the State Court, to be, at the time when Wilkes County bonds were put upon the market.

On page 530, 180 U. S., Justice HARLAN further says:

"So far from the *Belo* case turning, in part, upon the ratifying Act of 1868, the Court distinctly adjudged that the bonds were valid, in the hands of *bona fide*

holders under the ordinance of 1868 *without the aid of the Act of August 11, 1868.*"

Further says Justice HARLAN:

"It is the settled doctrine of this Court, that the questions arising in a suit in a Federal Court, of the power of a municipal corporation, to make negotiable securities, is to be determined by the law, as judicially declared, by the highest Court of the State, when the securities were issued, and the rights and obligations of parties accruing under such a state of the law could not be affected by a different course of judicial decisions, subsequently rendered, any more than by legislation. *Loeb vs. Trustees of Columbia Township*, 179 U. S., 472," etc.

That the railroad into Wilkes County was authorized by the ordinance of 1868, and that the bonds in question were also authorized by said ordinance is fully shown in the opinion of Judge MORRIS. He says (Record, p. 114):

"If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo v. Commissioners (1877), 76 N. C., 489, that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued. The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868:

"'SECTION 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, etc.'

"'SEC. 2. Be it further enacted that the capital stock

of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars.'

"Section 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five mile sections to the towns of Winston and Salem, in Forsyth county, which portion of the railroad when completed 'shall constitute its first division.'

"Sections 8 and 9 provide that the state should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of $10,000 per mile upon the security of a first mortgage of the entire road and its property.

Section 12 is as follows:

"Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

"SECTION 13. Be it further enacted that the company shall have the power to construct branches of said road, one of which shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

Section 33 of the charter of the North Carolina and Atlantic Railroad Company, passed in 1852, chapter 136, is as follows:

"SECTION 33. Be it further enacted that it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

Sections 34, 35, 36 and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified voters voting upon the question are in favor of the subscription, provide how the subscription shall be made, and that the county shall negotiate a loan or loans and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolnia and Atlantic railroad into the charter of the Northwestern North Carolina railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county and to issue bonds in payment and to levy taxes to pay the principal and interest. The first question, therefore, now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county just as the same powers in the same charter were held by the Supreme Court of North Carolina in *Belo v. Commissioners*, to have done in the case of Forsyth county.

The convention ordinance authorizes counties to subscribe to the stock of the railroad company, and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations and restrictions set forth in the charter of 1852, chapter 136. The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad, in aid of which the bonds in suit were issued, does pass through Wilkes county.

"It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State to be thereafter determined, and contemplated and provided for its being buit by divisions, and enacted that the portion to Salem and Winston should constitute its First division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the State; and, indeed, it seems evident that such a railroad to some point in the northwestern boundary line of the State must pass near or through Wilkes county. The act of February 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the Convention ordinance shall be amended by adding

certain words which make it read, when so amended, as follows:

SEC. 13. Be it further ordained that the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia (amendment), " *and one of which shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as second division.*"

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division ; and Section 4 provides for bond subscriptions by any county in the State. This act was invalid so far as it attempted to give power to the counties *to create a debt*, because it was not passed as laws for that purpose are required by the Constitution of North Carolina to be passed, *but that invalidity does not affect the sections of the law which deal with other matters.*

Rodman vs. Washington, 122 N. C., 39–42.
Russell vs. Ayres, 120 N. C., 180–189.
Gamble vs. McCrady, 75 N. C., 509.
Bank vs. Commissioners, 119 N. C., 214.

So far as now appears, the amendment locating the road into Wilkes county was validly passed, and became a valid law of North Carolina.

If section 13 had been originally enacted as it now reads as amended, it would seem clear that as when built this piece of road was declared to be the second division of said road, and as power was given to all counties " near or through which said railroad may pass " to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the first division. Wilkes would be one of the counties through which the Second division of the road was authorized to be constructed, just as Forsyth was a county, into which, the First division of the road was to be built.

" Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has.

"In *Commissioners vs. Call*, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon *a want of power affecting both alike*, and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

"The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the Second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had."

Again, says Judge MORRIS:

"We think that Wilkes county when the bonds in suit were issued was in the same category with Forsyth county, and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of *Hill vs. Commissioners* (1870), 67 N. C., 367, and *Belo vs. Commissioners* (1877), 76 N. C. 489, as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of *bona fide* holders (*Loeb vs. Trustees*, 179 U. S., 472, 492; 21 Sup. Ct., 174, 45 L. Ed., 280.")

On page 35 of the record, in paragraph 8 of the complaint filed in the action in the State Court it is alleged that it is only Section 4 of the Act of 1879, chapter 43, providing for counties subscribing to the capital stock of the company, that is void. That part of the statute, providing for the *route of the road*, is valid, and so admitted to be in that complaint.

It is well settled that a part of an act may be constitutional and another part unconstitutional.

Again, the route of the road was not only determined by the Legislature, but by the county and also by the company. When the charter was passed, that is, the ordinance of 1868, a new person was brought into existence, known as the Northwestern North Carolina Railroad Company, and certain powers, franchises of the corporation, were conferred upon it.

When this power to subscribe to the capital stock of the company was conferred upon *Forsyth County* there was also a privilege conferred upon the *company.*

In the exercise of this privilege, if Wilkes was in the same category as Forsyth, the company assented to the route settled upon by the county, empowered to do so by the Legislature (see Printed Record, page 43, Ex. B. 42). "The above order," providing for the election and pointing out the route and the building of the road to Wilkesboro, "is made at the request of the North Western North Carolina Railroad Company, and with their full concurrence."

So that it appears that it was by the Legislature and the county, acting under and in accordance with the Act, and also by the company, in the exercise of its privilege conferred upon it by its charter, the ordinance of 1868, that route was settled.

In further consideration of the ordinance of the Convention of 1868, the charter of this railroad company, we see that it gave the power to build branches of the road in *any* direction, and we see that the statutes, relied on by the complainants, were amendments to the charter, and gave no *powers not already conferred by the charter itself upon the company and counties, towns and cities.*

We see, also, that the charter was granted in 1868,

before the Constitution went into effect, and the statutes printed in the record, and amendatory of the same, passed after the Constitution was adopted.

Here we ask a consideration of the case of the *County of Scotland vs. Thomas*, 94 U. S., 682.

On page 689 of the volume in that case, Justice BRADLEY says:

"The specific question in the present case, therefore, is whether the authority given to counties and towns in 1857, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question, by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call*, before referred to.

As we view the brief filed in this case, in support of the petition for *certiorari*, it seems to be substantially the same as that filed in the *Stanly case.*

In both, we observe that the counsel for the counties have not been able to find elsewhere than in our brief, and the opinion of Judge BOYD, the rule that the Court will uphold bonds, issued as these were, if, under any circumstances, it can do so.

We say here, as we did in our brief in the Stanly case, that the counsel could study the opinion of Justice BYNUM in the *Belo case* with profit, as also the opinion of Justice GRAY, in the case of *Louisville, etc., Railway Co. vs Louisville Trust Company*, 174 U. S., pages 573 and 574.

In the latter, says that Justice :

" In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated as an axiomatic principle in the law of corporations this proposition : ' Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such case has a right to presume their existence, and the corporation is estopped to deny them.' 10 Wall., 644, 645. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* (1856), 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand* as well decided upon its facts. *Knox County vs. Aspinwall*, 21 Howard, 539, 545 ; *Moran vs. Miami County*, 2 Black, 722, 724 ; *Gelpecke vs. Dubuque*, 1 Wall, 175, 203 ; *St. Joseph vs. Rodgers*, 11 Wall, 644, 666 ; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited."

The cases cited by Justice GRAY in the above paragraph are decided upon *municipal bonds*, and show that the principle he states applies to contracts with municipal as well as with other corporations; and the late Justice MILLER, in his dissenting opinion in the case of *Humboldt Township vs. Long*, 92 U. S., pages 650 and 651, says, the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case, on which the rule and principles are based, is itself based upon *The Royal British Bank vs. Turquand.*

Every case cited by Justice GRAY is a case upon municipal bonds.

Justice BYNUM, in *Belo vs. Commissioners*, says:

"While the decisions are very uniform that the record of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive, and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it. *Town of Coloma vs. Evans*, 92 U. S., 484. *Knox County vs. Aspinwall*, 21 Howard, 539. Mr. Justice GRAY says: 'In the leading case of Knox vs. Aspinwall, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the Royal British Bank vs. Turquand, 6 Ellis and Blackburn, in a case in the exchequer chamber, which fully sustains it."

The foregoing are the words of Justice BYNUM, in a decision which has never been departed from. Here

the Supreme Court, *in 1877*, approved of the doctrine in the Royal British Bank case, upon which *Knox vs. Aspinwall* was based.

We ask the Court, in view of this application for writ of *certiorari*, to consider the opinions of Judges MORRIS and BOYD, in support of their decree. They have carefully considered this case, as they did the *Stanly case*. This case has been, in one form and another, in Court for nearly four years. It has been considered by this Court, and it seems to us the question left open, to wit, whether the counties of Wilkes and Forsyth stand in the same category or not, a matter to be settled by the Circuit Court of Appeals, in its further proceedings, as directed by this Court, is one of fact more than law.

That Court has found that they did, both, stand alike, which seems to us to be an end of the case.

When this Court said that the only question in the case before it was whether the Wilkes County bonds now in suit were in the same category as the Forsyth County bonds, it meant to hold, and did hold that the ordinance of the Constitutional Convention was, *per se*, authority for issuing bonds, and needed no additional legislation to authorize such issue. That is a matter now no longer open to controversy, having been expressly decided by this Court. The only question left was whether Wilkes County was a county which was authorized to issue these bonds under the said ordinance ; and it was authorized to issue bonds under the said ordinance if it was a county "near or through which said railroad may pass." That it was such county was determined by the board that issued the bonds, and by a vote of the people, and by the construction of the road under such vote, in the county of Wilkes, said railroad being, as the record shows, the

only railroad that that county has to this day. The United States Circuit Court of Appeals held that Wilkes County was authorized to issue such bonds under the said ordinance, and properly so held. No other holding is possible under the facts shown in the record.

There are two distinct and independent sources of authority for the issue of these bonds of Wilkes County now in suit. One is the ordinance of the Constitutional Convention, to which I have confined the above discussion, the other is the Code, Sections 1996 to 2000, inclusive, which are discussed in the brief of associate counsel. Either of these authorities, as it exists, is sufficient, and one does not depend on the other, and each of these authorities was complied with in the issuance of these bonds.

Looking through the entire record, and seeing the good faith with which these bonds were issued, their sale and purchase, the completion of the railroad, in absolute performance of the contract, and the satisfaction of the public with the work, it does seem that there should be an end of this litigation.

CHARLES PRICE,
Of Counsel for Respondents.